87-895

Supreme Court, U.S.
FILED
NOV 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. HEDLUND, et al.,

Petitioners,

v.

ELSIE VIOLA MILLER, et al.,

Respondents.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
JEROME LIDZ
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Does the Sherman Act invalidate state regulations which require each beer and wine distributor to post its prices and offer those prices evenhandedly to all retailers for a specified period, but which neither permit concerted action among distributors nor grant any distributor the "private regulatory power" to set prices for other distributors or retailers, unless the state actively supervises each distributor's pricing decisions?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: William H. Hedland, Sylvia S. Bedingfield, Reuben A. Worster, Stan Auderkirk and Jill Thorne, individually in their representative capacities as the Commissioners of the Oregon Liquor Control Commission; C. Dean Smith, individually in his capacity as Administrator for the Oregon Liquor Control Commission (petitioners herein); Elsie Viola Miller and Oretta Bernice Lancaster, doing business as the Junction Cafe and Tavern; Taylors' Coffee Shop, Inc., dba Rennie's Landing; Wian, Inc., dba Barney's Cable, individually and as representatives of others similarly situated (respondents herein), and Beer and Wine Distributors Association, Inc.; Spear Beverage Co., Inc.; Coast Distributors, Inc.; and United Beer Distributing Company; individually and as representatives of others similarly situated.

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional Provisions, Statutes and Regulations Involved 1

Statement of the Case 5

Reasons to Grant the Writ 9

I. The Ninth Circuit erroneously construed the Commission's limited, purely public regulation as a "hybrid" restraint on competition which *per se* violated Section 1 of the Sherman Act 10

II. Both the concept of a "hybrid restraint" and the analysis which follows from characterizing state regulation as a hybrid restraint need clarification from this Court 20

Conclusion 23

Appendix A
Ninth Circuit Court of Appeals Opinion App-1

Appendix B
District Court for the District of Oregon Opinion .. App-19

Appendix C
Ninth Circuit Court of Appeals Order App-35

TABLE OF AUTHORITIES

Page

Cases Cited

Battipaglia v. N.Y. State Liquor Authority, 745 F.2d 166 (2d Cir. 1984) 21

California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980) ..... passim

Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911) 15

Enrico's, Inc. v. Rice, 551 F.Supp. 511 (N.D. Cal. 1982) 21

Fisher v. City of Berkeley, Cal , 106 S.Ct. 1045 (1986) .... passim

Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330 (Minn. 1984) 21

Lewis-Westco v. Alcoholic Bev. Cont.App. Bd., 136 Cal.App.3d 829, 186 Cal.Rptr. 552 (1982) 21

Miller v. Hedlund, 579 F. Supp. 116 (D. Or. 1984) 1

Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987) ..... 1,8 - 11,12

Miller v. OLCC, 42 Or. App. 555, 600 P.2d 954 (1979), *review denied* 288 Or. 493 (1980) 7,11

Miller v. Oregon Liquor Control Com'n, 688 F.2d 1222 (9th Cir. 1982) 7

Morgan v. Division of Liquor Control, Etc., 664 F.2d 353 (2d Cir. 1981) 21

Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958) 15

Parker v. Brown, 317 U.S. 341 (1943) 7,18

Rice v. Norman Williams Co., 458 U.S. 654 (1982) 16

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) ..... passim

Serlin Wine & Spirits Merchants, Inc. v. Healy, 512 F.Supp 936 (D. Conn. 1981) 21,22

Southern Motor Carriers v. U.S., 471 U.S. 48 (1985) 20

324 Liquor Corp. v. Duffy, 107 S.Ct. 720 (1987) ..... passim

TABLE OF AUTHORITIES—Continued

Page

Cases Cited—Continued

Town of Hallie v. Eau Claire, 471 U.S. 34 (1985) 18-19,20

Wine and Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416 (Mo. 1984) 21

Constitutional Provisions

U.S. Const. Art. VI 1-2

Statutory Provisions

15 U.S.C. § 1 (1982) ..... passim

15 U.S.C. § 2 (1982) 1

15 U.S.C. § 15 (1982) 1

15 U.S.C. § 26 (1982) 1

28 U.S.C. § 1254(1) (1982) 1

28 U.S.C. § 1331 (1982) 1

50 Stat. 693 13

Ariz. Rev. Stat. Ann. § 4-252 23

Calif. Bus. & Prof. Code § 25000 23

Conn. Gen. Stat. § 30-63 23

Del. Code Ann. tit. 4, § 508 23

Georgia Comp. R. & Regs. r. 560-2-3-.45 23

Haw. Rev. Stat. § 281-123 23

Kan. Stat. Ann. § 41-1101 23

Mass. Gen. L. chapter 138, § 25C 23

Me. Rev. Stat. tit. 28, § 655, tit. 28A, § 1408 23

Mo. Rev. Stat. § 311.332, .334, .336, .338 23

N.M. Stat. Ann. § 60-8A-12 23

Or. Rev. Stat. § 471.030 (1985) 2

Or. Rev. Stat. § 471.705 (1985) 3

TABLE OF AUTHORITIES—Continued

Page

Statutory Provisions—Continued

Or. Rev. Stat. § 471.710 (1979 Replacement Part) 3

Or. Rev. Stat. § 471.710 (1985) 3

Or. Rev. Stat. § 471.715(1) (1985) 3

Or. Rev. Stat. § 471.730 (1985) 2

Tenn. Code Ann. § 57-6-104(a) 23

Wash. Admin. Code § 314-20-100 23

Wash. Admin. Code § 314-20-105 23

Wash. Admin. Code § 314-24-190 23

Wash. Admin. Code § 314-24-200 23

Administrative Regulations

Mich. Admin. Code r. 436.1625, 436.1726 23

N.J. Admin. Code tit. 13, § 2-24.5 23

Or. Admin. R. 845-06-090 (1987) 3

Or. Admin. R. 845-10-210 (1984) 3

Or. Admin. R. 845-10-210(1)(d) (1987) 3,16

Or. Admin. R. 845-10-210(2)(d) (1987) 16

S.D. Admin. R. 64:75:03:02 23

Other Authorities

Sup. Ct. R. 20 1

Sup. Ct. R. 28 1

Sup. Ct. R. 29 1

PETITION FOR WRIT OF CERTIORARI

Petitioners, the Administrator and Commissioners of the Oregon Liquor Control Commission of the State of Oregon, respectfully pray that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), and is attached to this petition as Appendix A. The order and judgment of the district court is reported as *Miller v. Hedlund*, 579 F. Supp. 116 (D. Or. 1984), and is attached as Appendix B.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was dated and filed initially on October 31, 1986. The decision thereafter was withdrawn and then refiled on April 6, 1987. By order filed August 27, 1987, the Ninth Circuit denied defendants' timely petition for rehearing and suggestion for rehearing en banc. A copy of the order denying the petition for rehearing is attached as Appendix C. This petition for writ of certiorari is filed within 90 days following the filing of the order denying the petition for rehearing, pursuant to Sup. Ct. R. 20, as time is computed under Sup. Ct. R. 28 and 29. The district court had jurisdiction in this matter pursuant to 15 U.S.C. §§ 1, 2, 15 and 26 (1982), and 28 U.S.C. § 1331 (1982). Jurisdiction to review the judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

The Supremacy Clause, Article VI, of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

> Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Oregon Revised Statutes (Or. Rev. Stat.) § 471.030 (1985) provides in part:

> (1) The Liquor Control Act shall be liberally construed so as:
>
> (a) To prevent the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages.
>
> (b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages.
>
> (c) To protect the safety, welfare, health, peace and morals of the people of the state.
>
> (2) Consistent with subsection (1) of this section, it is the policy of this state to encourage the development of all Oregon industry.

Or. Rev. Stat. § 471.730 (1985) provides, in part:

> The function, duties and powers of the commission include the following:
>
> (1) To control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor in accordance with the provisions of this chapter.
>
> . . . .
>
> (5) To adopt such regulations as are necessary and feasible for carrying out the provisions of this chapter

and to amend or repeal such regulations. When such regulations are adopted they shall have the full force and effect of law.

Oregon Administrative Rules (Or. Admin. R.) 845-06-090 (1987) provides:

> A licensed retailer of malt beverages or of wine who is operating under a restaurant license, package store license, retail malt beverage license or dispenser license may transport, or have transported by the licensed retailer's employe or by a common carrier, from the licensed wholesaler premises to the licensed retailer premises, the malt beverages or wine sold to the licensed retailer by the licensed wholesaler. The purchase price of such malt beverages or wine shall be the price posted pursuant to OAR 845-10-210.

Or. Admin. R. 845-10-210 (1984) provided:

> *Price Posting.*
>
> (1) Posting of malt beverage prices:
>
> (a) Licensees of the Commission engaged in the business of soliciting the sale of, selling or distributing malt beverages for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in three copies of prices to be charged for all such beverages offered for sale within the state. The prices shall be uniform for the same class trade buyers and shall set forth:
>
> (A) All brands and types of products offered for sale,
>
> (B) The delivered sale price for each size container to retail licensees,
>
> (C) Prices or maximum allowances or discounts to wholesale licensees, and
>
> (D) Any allowance granted for return containers.
>
> All price postings shall be consistent as between the various packages and containers offered for sale. No price postings involving quantity discounts shall be made.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 180 days after the effective date of the posting. The Commission, at its discretion, may waive the 180-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

(2) Posting of wine prices:

(a) Licensees of the Commission engaged in the business of soliciting sales of, selling or distributing wine for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in two copies of prices to be charged by such licensee for all wine offered for sale within the state. The prices shall be uniform for the same class of trade buyers and shall set forth:

(A) All brands, classes and kinds of wine offered for sale, and

(B) The delivered sale price of each size container to retail licensees.

Prices shall be the same for one container as for each like container in any quantity comprising a sale, order or delivery. No allowance shall be made for return of containers and a wholesale licensee shall not purchase used containers from a retail licensee.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 30 days after the

effective date of the posting. The Commission, at its discretion, may waive the 30-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

STATEMENT OF THE CASE

The Oregon Liquor Control Act, enacted in 1933, established a regulatory system for the distribution of alcoholic beverages among manufacturers, wholesalers and retailers in Oregon. The Act also created the Oregon Liquor Control Commission (hereinafter, "OLCC" or "commission") and granted the commission extensive powers to adopt regulations to implement the statutory policies.[1]

Pursuant to statutory authority, the commission adopted regulations governing the sale of beer and wine by distributors to retailers.[2] These regulations, *inter alia*,

1) require distributors to post their prices with the commission ten days before their effective date;

2) require that price decreases which they post remain in effect for 180 days for malt beverages[3] and 30 days for wine

---

[1] As presently constituted, the OLCC consists of five commissioners appointed by the Governor, subject to confirmation by the Senate. Or. Rev. Stat. § 471.705 (1985). One commissioner is designated to be chosen from the food and alcoholic beverage industry. *Id.* The other four commissioners, as well as all persons holding office or position under the commission, are prohibited from having "any connection with any person engaged in or conducting any alcoholic liquor business of any kind" and from having any pecuniary interest in or receiving any profit from purchases by the commission or persons authorized to manufacture, purchase or sell any alcoholic liquors. Or. Rev. Stat. § 471.710 (1985). The commissioner appointed from the industry is not eligible to serve as the chairman of the commission. Or. Rev. Stat. § 471.715(1) (1985). When this litigation commenced in 1978, the statutes provided for three commissioners, none of whom was permitted to have ties to the alcoholic beverage industry. Or. Rev. Stat. § 471.710 (1979 Replacement Part).

[2] In Oregon, packaged hard liquor is sold exclusively through state-owned liquor stores, whereas beer and wine are sold by private retailers.

[3] The current rules require malt beverage prices to remain in effect for only 90 days and provide that the commission may waive the 90-day period under specified conditions. Or. Admin. R. 845-10-210(1)(d) (1987).

(the "post-off" rules);

3) require that the posted price be the purchase price to the retailer, regardless of the distributor's actual delivery costs (the "delivered price" rules); and

4) prohibit distributors from giving retailers discounts from the posted price based on the quantity of beer or wine sold to retailers.

Under these regulations, every distributor unilaterally sets its own prices, posts those prices and offers them uniformly to its customers for the period specified in the rules, without quantity or delivery-related discounts. No distributor has the power to set prices for any other distributor or for any retailer.

The uniform price regulations are designed to prevent "tied house" arrangements prevalent in earlier times, in which distributors controlled retail establishments through discriminatory pricing practices and left most retailers at the mercy of distributors who discounted prices to a few favored retailer-customers. The post-off rule prevents a distributor from posting a low price one day for a favored customer and then immediately restoring the higher price for other customers. Public price posting allows distributors and retailers to monitor and report to the commission any instances of non-compliance with the regulatory scheme.

In 1978, several retailers of beer and wine, respondents in this Court, filed suit in the United States District Court for the District of Oregon against the commission and several wholesaler-distributors. The retailers challenged the four regulatory provisions described above on the ground that the regulations had the effect of stabilizing beer and wine prices in violation of the Sherman Act, 15 U.S.C. §§ 1, *et seq.*[4] The

---

[4] The retailers subsequently dropped their challenge to the prohibition of quantity discounts, and the Ninth Circuit did not rule on it.

retailers sought declaratory and injunctive relief to prevent the commission from enforcing the challenged regulations.

In 1979, the district court stayed the proceedings to allow the Oregon courts to review the validity of the challenged regulations under the commission's enabling legislation. The Oregon Court of Appeals held the regulations to be valid and reasonably designed to advance statutory policy. *Miller v. OLCC*, 42 Or. App. 555, 600 P.2d 954 (1979), *review denied* 288 Or. 493 (1980).

Thereafter, the district court dismissed the retailers' federal suit on the ground that Oregon's involvement in the regulation and control of the liquor industry was sufficient to establish its immunity from federal antitrust law under the doctrine of state action immunity, first articulated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). Because the immunity was dispositive, the district court did not consider whether the regulations violated the Sherman Act or whether the Twenty-first Amendment constituted a defense. On appeal, the Ninth Circuit reversed the dismissal and remanded for further proceedings. *Miller v. Oregon Liquor Control Com'n*, 688 F.2d 1222 (9th Cir. 1982). The Ninth Circuit held that Oregon did not "actively supervise" its regulatory policy and therefore was not entitled to immunity under *Parker v. Brown*. It expressed no opinion on the two issues which the district court had not reached.

On remand, the parties filed cross motions for summary judgment. The commissioners contended that the regulations did not violate the Sherman Act because they neither authorized nor required any concerted activity, and that neither the

commissioners nor the wholesaler defendants had engaged in any combination, conspiracy or agreement in restraint of trade. They also renewed arguments based on state action immunity and the Twenty-first Amendment.

The district court granted defendants' motion. The court found no concerted action as to the regulations requiring wholesalers to post their prices and adhere to them for certain time periods. Because compliance with the regulations entails only unilateral action by the distributors, the court concluded that the regulations did not violate the Sherman Act. The court found a conflict with the Sherman Act as to the delivered price regulations. Nonetheless, it relied on intervening changes in Oregon law to conclude that the regulations were protected by state action immunity. The court found no concerted activity on the part of the distributors and, accordingly, granted judgment in their favor as well.

The retailers appealed to the Ninth Circuit, which reversed and remanded. *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987). The Ninth Circuit concluded that the challenged regulations effected a *per se* violation of the Sherman Act, despite the absence of concerted activity among the distributors in their unilateral compliance with the commission's regulations. The absence of concerted activity, however, led the court to affirm the district court's judgment in favor of the distributors.

After concluding that the commission's regulations violated the Sherman Act, the court then decided that Oregon's involvement in the regulatory scheme was not sufficient for the state to invoke state action immunity. Because the court viewed Oregon's regulations as a "hybrid" restraint, it applied the two-pronged test of *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), conditioning immunity on a clearly articulated and affirmatively expressed state policy and the state's active supervision of the policy. Without

reaching the first prong of the *Midcal* test, the court concluded that the state clearly failed the second prong because the state does not actively supervise distributors' individually set prices. The Court remanded the case to the district court for consideration of the Twenty-first Amendment issue.

The Ninth Circuit withdrew its opinion pending this Court's decision in *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987). After that case was decided, the Ninth Circuit concluded that *324 Liquor Corp.* confirmed its reasoning in *Miller* and it, therefore, reissued its opinion. 813 F.2d 1344. The OLCC commissioners now petition this Court for a writ of certiorari.

REASONS TO GRANT THE WRIT

The Ninth Circuit erroneously concluded in this case that a state scheme regulating the manner in which beer and wine distributors set prices they charge to retailers is invalid under the Sherman Act, even though the regulations authorize no concerted activity and grant no private regulatory power. The Ninth Circuit's decision conflicts with decisions of other circuit and state courts which have upheld similar price regulation schemes against attack under the Sherman Act. Because many states have regulations similar to those at issue in this case, the Ninth Circuit's decision leaves those states in doubt as to whether their regulatory schemes withstand Sherman Act scrutiny.

In reaching its conclusion, the Ninth Circuit erroneously identified the regulations at issue in this case as "hybrid" restraints on competition. The court went astray partly because it lacked the guidance which would enable it to distinguish between hybrid and purely public restraints. While antitrust decisions from this Court are legion, the cases discussing the concept of hybrid restraints—how they are identified and what analysis applies to them—can be counted on one hand. The ability to distinguish between hybrid and purely public restraints, how-

ever, is critical. To establish the requisite "state action" necessary to give a hybrid regulatory scheme Sherman Act immunity, states must actively supervise the private, regulatory conduct that the scheme authorizes. On the other hand, states need not actively supervise private conduct authorized in a purely public scheme, because the only restraints on competition are those directly mandated by state law. The Oregon scheme is purely public because it confers no private regulatory power; hence, there is no conduct which the state must supervise.

Hybrid regulation, with its attendant active state supervision components, is expensive and time consuming to administer. States such as Oregon, which desire to regulate only limited aspects of the marketplace, need to know the difference between hybrid regulation and purely public regulation so that they can tailor their regulations, where possible, to avoid resource-draining "hybrid" regulatory schemes. Only this Court can provide the necessary guidance. Because this Court's resolution of the issue presented in this case will resolve a split in the circuits and have wide-ranging impact in an important and emerging area of antitrust law, the Court should grant this petition for writ of certiorari.

I. The Ninth Circuit erroneously construed the commission's limited, purely public regulation as a "hybrid" restraint on competition which *per se* violated section 1 of the Sherman Act.

The Ninth Circuit erred in concluding that Oregon's regulatory scheme is a "hybrid" restraint on competition forbidden by the Sherman Act. Oregon's regulations neither require nor authorize private parties to engage in concerted activity to restrain competition, and do not confer on private parties any regulatory authority. Each distributor acts independently in posting its own beer and wine prices, and no other distributor is required to read or follow any other distributor's

prices. The regulations mandate that distributors adhere to their posted prices for a set period, and that the posted prices be the delivered prices regardless of actual delivery costs. The posted prices do not control the prices retailers may charge, but do prevent distributors from giving preferential treatment (*e.g.*, lower prices) to some retailers and not others.[5]

The Ninth Circuit rejected the state's argument that the absence of concerted activity among distributors precludes a finding that the regulations mandating this conduct violate the Sherman Act. The court also rejected the state's argument that the regulations conferred no private regulatory power but were a unilateral restraint imposed by government, immune from invalidation under the Sherman Act.

The court first noted that "[a]n agreement to adhere to previously announced prices and terms of sale is unlawful *per se* under the Sherman Act." 813 F.2d at 1349. The court then observed that because Oregon's regulatory scheme

> facilitate[s] the exchange of price information and require[s] adherence to the publicly posted prices. . . . the state compels activity that would otherwise be a *per se* violation of the Sherman Act. It is the presence of state compulsion that requires a more refined analysis than the one presented by the appellees. Simply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter.

Id.

After discussing this Court's decisions in *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. 1045 (1986), *Schwegmann Bros. v.*

---

[5] In upholding the commission's regulations against a challenge that the regulations exceed the commission's statutory authority, the Oregon Court of Appeals noted that the regulations advanced both statutory and constitutional objectives. Principal among those objectives were prohibiting financial assistance to retailers, separating possible wholesale and retail financial connections and ensuring that beer and wine prices would be the same for all retailers. *Miller v. OLCC*, 42 Or App at 561-62, 600 P2d at 957-58.

Calvert Distillers Corp., 341 U.S. 384 (1951), and *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), the court compared this case to *Schwegmann* and *Midcal* and concluded that Oregon's regulations were a "hybrid" restraint that violated the Sherman Act:

> First, *Schwegmann* demonstrates that a showing of concerted activity among the Oregon wholesalers is not necessary to establish an antitrust violation. The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge. In *Schwegmann*, non-contracting retailers were compelled to comply unilaterally with a state-authorized pricing scheme, but the absence of concerted activity among the retailers was not a bar to a finding of a Sherman Act violation. Second, *Schwegmann* and *Midcal* show that Oregon's actions are not unilateral. The regulations constitute a "hybrid" restraint because, as in those two cases, Oregon allows private parties to set the prices and does not review the reasonableness of those prices. It follows that this case is unlike the purely public restraint of Berkeley's regulatory scheme which removed the power to set rents from the landlords.

813 F.2d at 1350-51.

The Ninth Circuit erroneously relied on *Schwegmann* and *Midcal* to decide the instant case. As is discussed below, *Schwegmann* and *Midcal* did not require concerted activity because the conduct which the schemes in those cases authorized—resale price maintenance— constitutes a *per se* Sherman Act violation. *Midcal*, 445 U.S. at 102. In contrast, under Oregon's scheme, the required private conduct does not *per se* violate the Act, and, indeed, the Ninth Circuit dismissed the Sherman Act claim against the private distributors. The Ninth Circuit, thus, was wrong in concluding that Oregon's regulations did not have to authorize concerted activity to run afoul of the Sherman Act.

As is also discussed below, *Schwegmann* and *Midcal* were hybrid restraint cases because they conferred regulatory power on private individuals to restrain competition in a manner that violated the Sherman Act. Under Oregon's scheme, private distributors are granted no private, regulatory power because their conduct regulates no one else's behavior. The Ninth Circuit erred in further concluding that Oregon's regulatory scheme is a hybrid restraint on competition which is immune from the Sherman Act only if the state actively supervises private distributors' prices.

A. The Ninth Circuit erred in concluding that Oregon's regulations need not authorize concerted activity among distributors for the regulations to violate the Sherman Act.

The Ninth Circuit decided that because "concerted activity" was not present in either *Schwegmann* or *Midcal*, concerted activity by distributors in setting and adhering to their prices was not required in order for the Sherman Act to preempt Oregon's regulatory scheme. *Schwegmann* and *Midcal* are not controlling, however, because the rationale for dispensing with actual, concerted activity in those cases does not exist in the present case.

When this Court decided *Schwegmann*, the Miller-Tydings Amendment to the Sherman Act, 50 Stat. 693, authorized retail price fixing between consenting distributors and retailers, conduct which, but for the amendment, would constitute a *per se* violation of the Sherman Act. 341 U.S. at 386. The Miller-Tydings Amendment thus permitted distributors to restrain the market to the extent their market strength or position would enable them to co-opt retailers into agreeing to adhere to the distributors' retail prices. Louisiana, however, attempted to bind non-consenting retailers to retail price schedules set forth in distributors' agreements with other retailers. Louisiana law further permitted distributors

to enforce their price schedules against non-consenting retailers. This Court concluded that Louisiana, by permitting distributors to restrain the market in a way that their own market strength or position might not permit, had exceeded the scope of the exemption which the Miller Tydings Amendment had intended.

> And when we read what the sponsors wrote and said about the amendment, we cannot find that the distributors were to have the right to use not only a *contract* to fix retail prices but a *club* as well.

Id. at 395 (emphasis in original). Thus, without the shield of the Miller-Tydings Amendment, Louisiana's law authorized conduct which constituted a *per se* Sherman Act violation.[6]

In *Midcal*, California's statutory scheme similarly involved mandatory resale price maintenance. The scheme required wine producers to file either fair trade contracts or price schedules with the state, and required wine wholesalers to sell wine at the prices fixed in the contracts or price schedules. This Court noted that this regulatory scheme authorized resale price maintenance, a result which was *per se* in violation of the Sherman Act since repeal of the Miller-Tydings Act in 1975. 445 U.S. at 102. Because the scheme gave wine producers the power to dictate the prices that wholesalers could charge,

> such vertical control destroys horizontal competition [among wholesalers] as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other."

---

[6] The Ninth Circuit probably is wrong that *Schwegmann* did not involve concerted activity. Indeed, under Louisiana law, before retailers who had not signed a resale price agreement could be bound to sell at the distributor's set retail price, that price had to be established in an agreement between the distributor and at least one retailer. 341 U.S. at 387.

Id. at 103 (quoting from Justice Hughes' opinion in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).

Concededly, the decisions in both *Schwegmann* and *Midcal* could have been clearer as to why the state regulatory schemes involved in those cases satisfied the "contract, combination . . . or conspiracy" requirement of section 1 of the Sherman Act. The scheme in *Midcal* did not authorize wine producers to agree either among themselves or with their wholesalers that wholesalers would adhere to the producers' specified resale prices. But because the statutory schemes authorized wine producers in *Midcal* and distributors in *Schwegmann* to restrain competition in a way that they could otherwise achieve only by "contract, combination . . . or conspiracy," the court apparently decided the concerted activity requirement of section 1 of the Sherman Act had been met. These cases, then, appear to hold that even without actual concerted activity, the Sherman Act preempts a regulatory scheme that authorizes conduct such as resale price maintenance, because the conduct has such a "pernicious effect on competition and lack[s] . . . any redeeming virtue" (*see Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958)), that it *per se* violates the Act.[7]

In terms of its anti-competitive effect, the conduct mandated by the commission's regulations in the present case is not in the same class as the conduct in *Midcal* and *Schwegmann*. First, the distributors' conduct, absent state compul-

---

[7] This Court's recent decision in *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987) is to the same effect. The Ninth Circuit said *324 Liquor Corp.* "confirms the reasoning and conclusions set forth in the opinion." 813 F.2d at 1345. Like the statutes in *Midcal* and *Schwegmann*, New York's liquor law authorized distributors to set minimum prices at which liquor would be sold at retail. This authority was conferred as a result of a scheme which required retailers to sell liquor at no less than 112 percent of the distributor's posted bottle price. This Court concluded that the analysis in *Midcal* provided the "framework" for resolving the issue in the case. 107 S.Ct. at 724.

sion, would not alone violate the Sherman Act. A distributor could lawfully decide to announce its prices and adhere to those prices for a given period. Setting prices violates the Sherman Act only if a private individual sets someone else's prices; setting one's own prices does not violate the Act. Yet, that is all that occurs under Oregon's regulatory scheme.

Second, the commission's regulations do not authorize, let alone mandate, *resale* price maintenance or any other conduct that *per se* would violate the Sherman Act. The prices posted by distributors do not prevent beer and wine retailers from charging any price they may deem appropriate, whether above or below the posted wholesale prices. Thus, the posting requirement permits intra-brand competition among retailers and, unlike the *Midcal* and *Schwegmann* schemes, it also permits inter-brand competition. Moreover, distributors of different brands freely may adjust their prices upward or downward after the lapse of 30 days (wine) or 90 days (beer) in response to prices posted by distributors of competing brands.[8] At most, Oregon's statutory scheme may have the effect of producing less vigorous inter-brand competition than might exist in the absence of the 30- and 90-day posting periods. But the fact that a state regulation might have some anti-competitive effect is not a basis for its invalidation under the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

In determining that Oregon's regulations satisfied the "contract, combination . . . or conspiracy" requirement because they require distributors to post prices and adhere to

[8] Restraint in inter-brand competition is further attenuated because only price *decreases* are subject to the 30-day and 90-day posting requirements. A distributor who posts a price increase is free at any time to respond to the competition by further increasing or decreasing its price. Moreover, a distributor who posts a price decrease will not be required to adhere to that price for the 30-day or 90-day period if it can convince the commission that circumstances warrant lifting the requirement. *See* Or. Admin. R. 845-10-210(1)(d) and (2)(d) (1987).

them, the Ninth Circuit ignored this Court's teachings in *Fisher v. City of Berkeley, Cal.*, and misconstrued the effect of Oregon's regulations under the Sherman Act. In *Fisher*, this Court held that a city ordinance freezing rents and granting a governmental body the authority to allow rental adjustments as conditions may warrant constituted "purely public" or "unilateral" government regulation exempt from the Sherman Act. 106 S.Ct. at 1051. This Court stressed that a landlord's (or distributor's) decision to adhere to its announced price for a set period does not amount to a contract, combination or conspiracy to restrain competition just because the state mandates the decision.

> A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords.

Id. at 1049-50. Just as the absence of actual, concerted activity by landlords to fix rental ceilings required the court to find that the City of Berkeley's regulations freezing rent levels did not violate the Sherman Act, so too, the absence of actual, concerted activity by beer and wine distributors should preclude a conclusion that OLCC's price posting regulations violate the Act.

The Ninth Circuit concluded that *Fisher* does not control the present case because in *Fisher* the regulatory scheme removed the landlord's power to set rents. But this is a distinction of degree only that should not matter in the ultimate analysis. To a degree, the commission's regulations also divest the distributors of their ability to set prices by mandat-

ing that once prices are set they must be adhered to for a given time. However, the regulations also provide that the commission may permit posted prices to be adjusted upward if conditions warrant the increase. *See* note 8, *supra*. That beer and wine distributors, at the end of the posted period, are free to adjust their prices up or down does not prevent the regulations from being "purely public" or "unilateral" under the *Fisher* analysis. If the City of Berkeley had imposed less ambitious rent stabilization measures that simply required landlords to adhere to rental prices for a period of six months or one year, after which they could adjust their rental prices up or down as they deemed appropriate, it is inconceivable that this Court would hold the city's failure to set the rental prices at the end of the period subjected the regulations to Sherman Act scrutiny.

The Ninth Circuit was wrong in concluding that concerted activity by distributors was not necessary to find that the Sherman Act preempted Oregon's regulations.

B. To the extent Oregon's regulations may authorize conduct that *per se* violates the Sherman Act, the regulations are pure "state action" and confer no private regulatory authority.

Even assuming Oregon's regulations fulfilled the concerted activity requirement, as they did in the resale price fixing cases discussed above, that fact is not fatal. Where, as here, the state regulations mandate price posting and adherence to those prices, and set the period for which prices must remain in effect, the regulations are not invalid. It is just this kind of state action that the Court held in *Parker v. Brown* to be immune from challenge under the Act. As the Court in *Parker* stated, "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351. *See also Town of Hallie v. Eau Claire*, 471 U.S. 34

(1985); *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. at 1051-52 (Powell, J., concurring). Precisely because the state regulations require price posting, specify how long distributors must adhere to their prices and grant private parties no discretion or "regulatory power" in this regard, the regulations constitute pure "state" action, immune from the Sherman Act, and not "hybrid" state action for which immunity can only be determined after applying the two-pronged *Midcal* analysis.

Hybrid restraints exist when state regulations confer on private entities a degree of private regulatory power. *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. at 1050. *Midcal* requires the state actively to supervise the private regulatory power to ensure that the private decisions made pursuant to that power advance state policy, not the private actor's own interests. *Town of Hallie*, 471 U.S. at 47. In *Schwegmann*, *Midcal* and *324 Liquor Corp.*, because the state allowed private parties to set the resale prices, the state was required actively to supervise those prices to ensure that they were consistent with the state's articulated resale price maintenance policy.

In Oregon's regulatory scheme, unlike those considered in *Schwegmann*, *Midcal* and *324 Liquor Corp.*, the predicate for active state supervision—conferrence of private, regulatory power—is absent. The scheme does not authorize distributors to agree among themselves to post their prices and adhere to those prices for a period they agree upon. Posting prices and the period for adherence to those prices are mandated by the regulatory scheme itself. The regulations *confer* no private power, because even without state involvement, distributors may establish their own prices. Moreover, because setting once's own prices regulates no one else's conduct, no "regulatory" power is conferred.

Because Oregon's scheme confers no private, regulatory power, Oregon's regulatory scheme is not "hybrid." No requirement or reason exists for the state to supervise dis-

tributors' prices. *Fisher*, not *Midcal*, should control. This Court should reverse the Ninth Circuit's decision that Oregon's regulatory scheme is a "hybrid" restraint which survives the Sherman Act only if the state actively supervises distributors' own prices.

II. Both the concept of a "hybrid restraint" and the analysis which follows from characterizing state regulation as a hybrid restraint need clarification from this Court.

In a series of cases decided over the past twelve years, this Court has developed a framework for determining the types of state regulation and regulated activities which are not preempted by or are immune under the Sherman Act. The focus of the inquiry has been to ascertain the degree to which the challenged conduct represents the policy of the state acting in its sovereign capacity, as opposed to private conduct motivated by private interests. To refine that inquiry, the Court recently has developed a modified analysis for "hybrid restraints" on competition, which require closer scrutiny than purely public ones. *See 324 Liquor Corp. v. Duffy*; *Fisher v. City of Berkeley, Cal.*; and *Rice v. Norman Williams Co.* (Stevens, J., concurring in the judgment). Yet the precise nature of hybrid restraints—as well as the analysis that follows from that characterization—remains unclear.

To date, the Court has analyzed as a hybrid restraint only state regulation which confers regulatory power on private parties. *See, e.g., California Liquor Dealers v. Midcal Aluminum*; *324 Liquor Corp v. Duffy*; *Southern Motor Carriers v. U.S.*, 471 U.S. 48 (1985). The court of appeals treats Oregon's regulatory scheme as a hybrid restraint, even though the scheme confers no private regulatory power and even though the court agreed that the private defendants had not themselves violated the Sherman Act. The Ninth Circuit fails to distinguish between state action which merely requires pri-

vate parties to comply with the state's market regulations and that which grants them power to regulate other private parties. As a result, the court upsets the delicate balance between federal supremacy and state sovereignty which lies at the heart of our federal system. The Ninth Circuit's approach illustrates the need for this Court to clarify the "hybrid restraint" aspect of the preemption and state action immunity doctrines.

The Ninth Circuit's decision also is flatly inconsistent with decisions of other federal courts of appeals, federal district courts and state supreme courts rejecting antitrust challenges to state regulations requiring posting of wholesale prices and adherence to those prices for a specified time.[9] The Second Circuit sustained such regulations in New York and Connecticut respectively in *Battipaglia v. N.Y. State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984) and *Morgan v. Division of Liquor Control, Etc.*, 664 F.2d 353 (2d Cir. 1981), *affirming Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F.Supp 936 (D. Conn. 1981). Substantially similar price posting and price adherence regulations survived antitrust challenges in *Enrico's, Inc. v. Rice*, 551 F.Supp. 511 (N.D. Cal. 1982), *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330 (Minn. 1984), and *Wine and Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416 (Mo. 1984). Each of these decisions reviews this Court's *Midcal* opinion in detail and distinguishes the price-posting and price adherence regulations from the regulatory scheme invalidated in *Midcal*. Nothing in the courts' analyses suggests that this Court's most recent decision in *324 Liquor Corp.* would alter their decisions.[10]

---

[9] *Miller* is consistent, however, with the decision in *Lewis-Westco v. Alcoholic Bev. Cont.App. Bd.*, 136 Cal.App.3d 829, 186 Cal.Rptr. 552 (1982), *cert. denied*, 464 U.S. 863 (1983).

[10] *See 324 Liquor Corp., supra*, 107 S.Ct. at 725, n.6, distinguishing *Morgan v. Division of Liquor Control, supra.*

As a matter of policy, a state's interest in regulating an industry or profession may justify regulation which ranges from minimum oversight designed to punish or prevent specific types of abuses to close scrutiny of every aspect of the regulated industry or profession. The Ninth Circuit's decision unnecessarily constrains the state's latitude to fashion its policy. The decision requires a state which imposes limited constraints on price competition to assume the burden of overseeing competitive pricing decisions made within the state's regulatory framework, even where the regulation confers no private, regulatory power and authorizes no private, anti-competitive conduct.

Oregon has neither reason nor resources to review the reasonableness of distributors' prices, as the Ninth Circuit would require. Oregon has set a few, relatively unrestrictive boundaries on price competition; within those boundaries, it does nothing to alter the balance of competitive forces. If a state which seeks to impose minimal restraints must necessarily occupy the entire field, "nothing short of a complete monopolization of the industry by the State could escape Sherman Act liability." *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F.Supp. at 939. Nothing in this Court's decisions supports the proposition that a state which regulates some aspects of the marketplace violates the Sherman Act unless it assumes full control of the marketplace.

Several states' price posting regulations are in jeopardy under the Ninth Circuit's analysis. Nearly every state imposes extensive regulation on the sale of alcoholic beverages. While the specifics of the regulatory schemes vary considerably from one state to another, the price posting features of Oregon's regulation are a common ingredient of many state regulations.[11] Given the Ninth Circuit's decision in the

[11] Twenty-three states require price posting for distilled spirits, beer and

(Footnote continued on next page)

present case, these states are left in a quandary as to whether their price posting regulations are a permissible means of regulating the liquor industry. This Court's guidance in distinguishing between purely public and hybrid regulatory schemes is critical, not only for the benefit of states which actively regulate the liquor industry, but also for all state and governmental units which engage in limited regulation of other areas of the private marketplace.

CONCLUSION

For the reasons given above, the Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
JEROME LIDZ
Assistant Attorney General
Counsel for Petitioners

(Footnote continued from previous page)

wine, or at least one of the three. *See, e.g.*, Ariz. Rev. Stat. Ann. § 4-252; Calif. Bus. & Prof. Code § 25000; Conn. Gen. Stat. § 30-63; Del. Code Ann. tit. 4, § 508; Georgia Comp. R. & Regs. r. 560-2-3-.45; Haw. Rev. Stat. § 281-123; Kan. Stat. Ann. § 41-1101; Me. Rev. Stat. tit. 28, § 655, tit. 28A, § 1408; Mass. Gen. L. ch. 138, § 25C; Mich. Admin. Code r. 436.1625, 436.1726; Mo. Rev. Stat. §§ 311.332, .334, .336, .338; N.J. Admin. Code tit. 13, § 2-24.5; N.M. Stat. Ann. § 60-8A-12; S.D. Admin. R. 64:75:03:02; Tenn. Code Ann. § 57-6-104(a); Wash. Admin. Code §§ 314-20-100, 314-20-105, 314-24-190, 314-24-200.

APPENDIX A

Elsie Viola MILLER and
Oretta Bernice Lancaster,
doing business as the Junction Cafe and Tavern;
Taylor's Coffee Shop, Inc.,
dba Rennie's Landing;
Wian, Inc., dba Barney's Cable,
individually and as representatives
of others similarly situated,
Plaintiffs-Appellants,

v.

William H. HEDLUND;
Sylvia S. Bedingfield;
Reuben A. Worster;
Stan Auderkirk and Jill Thorne,
individually in their representative
capacities as the Commissioners of the
Oregon Liquor Control Commission;
C. Dean Smith,
individually in his capacity as Administrator for the
Oregon Liquor Control Commission,
Spear Beverage Co., Inc.,
and Coast Distributors, Inc.;
individually and as representatives of
others similarly situated,
Defendants-Appellees.

No. 84-3749.

United States Court of Appeals,
Ninth Circuit.

Argued July 10, 1985.

Decided Oct. 31, 1986.

Withdrawn Dec. 19, 1986.

Resubmitted Jan. 21, 1987.

Refiled April 6, 1987.

[Names of counsel omitted in printing]

Before BROWNING, Chief Judge, ALARCON, Circuit Judge, and STEPHENS,* District Judge.

ORDER

The opinion in this case was originally filed on October 31, 1986. On December 19, 1986, the opinion was withdrawn and the submission of this case was vacated pending resolution by the United States Supreme Court of *324 Liquor Corp. v. Duffy*, No. 84-2022. *324 Liquor Corp.* was decided on January 13, 1987 and is reported in ___ U.S. ___, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987). This case was resubmitted on January 21, 1987.

324 Liquor Corp. confirms the reasoning and conclusions set forth in the opinion that was withdrawn. It is hereby ordered that the opinion filed on October 31, 1986 and withdrawn on December 19, 1986 be refiled with this order.

STEPHENS, District Judge:

BACKGROUND

This is an appeal from a summary judgment rejecting plaintiffs' antitrust challenge to certain Oregon regulations governing the sale and distribution of beer and wine. The district court's judgment is reversed and remanded for further proceedings in accordance with this opinion.

The Oregon Liquor Control Act was enacted in 1933. It established a distribution structure for alcoholic beverages among manufacturers, wholesalers and retailers in Oregon. *See* O.R.S. sections 471.205, *et seq.* It also estab-

---

* Honorable Albert Lee Stephens, Jr., Chief Judge Emeritus, Central District of California, sitting by designation.

lished a six-member Oregon Liquor Control Commission (OLCC) to administer its provisions. *See* O.R.S. section 471.705. The Oregon Liquor Control Act gave the OLCC extensive power to promulgate rules and regulations to carry out the purposes of the Act. O.R.S. sections 471.040, 471.730, 471.045; *Van Ripper v. Oregon Liquor Control Commission*, 228 Or. 581, 591, 365 P.2d 109 (1961). Oregon Revised Statutes sections 471.210, *et seq.* set forth requirements for the licensing of wholesalers of beer and wine. Other provisions in the Oregon Revised Statutes prohibit a licensee's selling at both the wholesale and retail levels (O.R.S. section 471.452); restrict a wholesaler or manufacturer from having an interest in a retailer (O.R.S. section 471.455); and prevent a manufacturer or wholesaler from providing any financial assistance to any retailer (O.R.S. section 471.465).

In 1978, Miller, Lancaster and other tavern owners in Oregon (the retailers) sued the OLCC and several wholesalers of beer and wine, contending that certain regulations promulgated by the OLCC, specifically Oregon Administrative Rules section 845-10-210 and 845-06-090 (1980)[1] have the effect of stabilizing and maintaining the prices of beer and wine in

---

[1] The challenged regulations read as follows:

Oregon Administrative Rule 845-10-210:

Price Posting.

(1) Posting of malt beverage prices:

(a) Licensees of the Commission engaged in the business of soliciting the sale of, selling or distributing malt beverages for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in three copies of prices to be charged for all such beverages offered for sale within the state. The prices shall be uniform for the same class trade buyers and shall set forth:

(A) All brands and types of products offered for sale,

(B) The delivered sale price for each size container to retail licensees,

(Footnote continued on next page)

Oregon in violation of the Sherman Act, 15 U.S.C. section 1, *et*

(Footnote continued from previous page)

(C) Prices or maximum allowances or discounts to wholesale licensees, and

(D) Any allowance granted for return containers.

All price postings shall be consistent as between the various packages and containers offered for sale. No price postings involving quantity discounts shall be made.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 180 days after the effective date of the posting. The Commission, at its discretion, may waive the 180-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

(2) Posting of wine prices:

(a) Licensees of the Commission engaged in the business of soliciting sales of, selling or distributing wine for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in two copies of prices to be charged by such licensee for all wine offered for sale within the state. The prices shall be uniform for the sale class of trade buyers and shall set forth:

(A) All brands, classes and kinds of wine offered for sale, and

(B) The delivered sale price of each size container to retail licensees.

Prices shall be the same for one container as for each like container in any quantity comprising a sale, order or delivery. No allowance shall be made for return of containers and a wholesale licensee shall not purchase used containers from a retail licensee.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 30 days after the effective date of the

(Footnote continued on next page)

seq.[2] The plaintiffs objected to the following four features of the rules: the prohibition of quantity discounts; the requirement that licensees post prices ten days prior to their effective dates; the requirement that price decreases generally remain effective after posting for a period of 180 days for malt beverages and 30 days for wine; and the requirement that the posted price be the delivered price regardless of transportation costs. The retailers sought declaratory and injunctive relief restraining the OLCC from enforcing the regulations.

In 1979, the district court stayed proceedings to allow the Oregon courts to review the validity of the challenged regulations with respect to the OLCC's enabling legislation. The Oregon Court of Appeals held that the regulations were valid and reasonably designed to further statutory purposes. *Miller v. Oregon Liquor Control Commission*, 42 Or.App. 555, 600 P.2d 954 (1979) (*Miller I*).

In 1980, the district court granted defendants' motion to dismiss the retailers' federal suit on the ground that Oregon's

---

(Footnote continued from previous page)

posting. The Commission, at its discretion, may waive the 30-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

Oregon Administrative Rule 845-06-090:

Transportation by licensed retailer from licensed wholesaler premises. A licensed retailer of malt beverages or of wine who is operating under a restraurant license, package store license, retail malt beverage license or dispenser license may transport, or have transported by the licensed retailer's employee or by a common carrier, from the licensed wholesaler premises to the licensed retailer by the licensed wholesaler. The purchase price of such malt beverages or wine shall be the price posted therefor, pursuant to section [845-10-210] hereof, for the trade zone at the licensed retailer premises. –

[2] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is declared to be illegal. . . ."

involvement in the regulation and control of the liquor industry was sufficient to establish immunity from federal antitrust law under the state action exemption first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). On appeal, this court reversed the district court's dismissal, holding that Oregon's regulatory policy is not "actively supervised" by the state itself, which supervision the court considered necessary in order to invoke *Parker* immunity. *Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222, 1227 (9th Cir. 1982) (*Miller II*). No opinion was expressed regarding the existence of an antitrust violation or the Twenty-first Amendment.

On remand, the plaintiffs moved for summary judgment. The defendants filed a cross-motion for summary judgment on the grounds that they had not engaged in a combination, conspiracy, or agreement in restraint of trade and that the regulations do not authorize or require any concerted activity. Defendants further argued that Oregon's enforcement of the regulations should be accorded state action immunity under *Parker v. Brown*, or be held valid under the Twenty-first Amendment to the United States Constitution.

The district court denied plaintiffs' motion, and granted the defendants' motion, holding that the regulation requiring wholesalers to publicly post their prices and adhere to those prices for certain periods of time do not conflict with federal antitrust policy since they only require "unilateral" action by individual wholesalers, rather than the concerted action necessary for a violation of the Sherman Act, 579 F.Supp. 116. The court determined that the regulations requiring the posted price to be the delivered price and forbidding quantity discounts conflicted with the Sherman Act, but nonetheless upheld them on the basis of *Parker* immunity, relying on certain intervening changes in Oregon law. The court's decision did not include a discussion of the applicability of the

Twenty-first Amendment. The court also held in favor of the wholesalers, because of the absence of any concerted activity on their part.

The plaintiff retailers appealed the district court's order granting summary judgment to defendants. They contended that the posting and post-off provisions and the delivered price rule[3] conflict with the Sherman Act because of the conduct they require, and that it is not necessary that a separate agreement in restraint of trade be formed in order to find a violation of the Sherman Act. The retailers further claim that the challenged regulations are not exempt from the Sherman Act under *Parker v. Brown* because the state does not actively supervise the prices set by the wholesalers and because the state has not articulated a policy to displace competition in the wholesale distribution of beer and wine. Finally, they argue that the Twenty-first Amendment does not save the regulations from a Sherman Act challenge.

The issues which must be decided are (1) whether the regulations effect a *per se* violation of the Sherman Act; (2) if they do, whether they fall within the *Parker* exemption; (3) and whether the Twenty-first Amendment saves the regulation from the antitrust challenge.

STANDARD OF REVIEW

This court reviews a grant of summary judgment *de novo* "to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

ANTITRUST ISSUE

The analytical framework that structures the approach to the antitrust issue is set forth in *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982).

---

[3] The quantity discount rule is not challenged on appeal.

> In determining whether the Sherman Act pre-empts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.
>
> A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.

Id. at 659, 102 S.Ct. at 3298 (citations omitted). The court went on to add the following:

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under section 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

Id. at 661, 102 S.Ct. at 3300.

The general issue here is therefore whether the Oregon regulations effect a *per se* violation of the Sherman Act. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for

their use." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Such agreements or practices are deemed unlawful *per se* and require no further factual inquiry under the "rule of reason" generally applied in Sherman Act cases. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1 (1979).

An agreement to adhere to previously announced prices and terms of sale is unlawful *per se* under the Sherman Act, "even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S.Ct. 1925, 1928, 64 L.Ed.2d 580 (1980) (*per curiam*), *discussing Sugar Institute v. United States*, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936). It is no defense that the prices fixed are themselves reasonable. *Id.*; *see also Northern California Pharmaceutical Assoc. v. United States*, 306 F.2d 379, 385 (9th Cir. 1962) ("there is no defense to *price-fixing* on the ground that it is reasonable"), *cert. denied*, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962).

Section 1 of the Sherman Act is directed at prohibiting unreasonable restraints of trade effected by a contract, combination, or conspiracy among separate entities. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). It is therefore necessary to distinguish the independent activity of a single entity from a concerted effort by more than one entity to fix prices or otherwise restrain trade. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984).

If the wholesale beer and wine distributors had entered into a private agreement to accomplish what is otherwise required by the Oregon regulations, there is no question that a

per se violation of Section 1 of the Sherman Act would be found. The appellees point out, however, that the wholesalers merely act unilaterally in response to the requirements of the regulations and that there is no agreement or concerted activity of any sort among them. They conclude that this absence of any concerted activity precludes the existence of any Sherman Act violation.

The appellees' treatment of this difficult issue oversimplifies it. While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a *per se* violation of the Sherman Act. It is the presence of state compulsion that requires a more refined analysis than the one presented by the appellees. Simply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter.

The Supreme Court recently addressed the unilateral versus concerted activity issue in a case involving an antitrust challenge to a municipality's regulation. In *Fisher v. City of Berkeley*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), the City enacted a rent control ordinance imposing strict rent ceilings on rental property. A group of landlords challenged the ordinance. The issue before the Court was whether the ordinance was pre-empted by federal antitrust laws. The landlords argued that the rent controls were a form of horizontal price-fixing and therefore were a *per se* violation of the Sherman Act. The Court rejected this argument and upheld the validity of the ordinance. The opinion discussed the critical distinction between unilateral and concerted action and held that there was no violation of the Sherman Act because of the absence of any concerted activity. "A restraint

imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Id.*, 106 S.Ct. at 1049-1050.

The following language from this opinion is crucial to the issue in this case.

> Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of section 1. Certain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private marketing decisions. See *Rice v. Norman Williams Co.*, 458 U.S. [654], at 665 [102 S.Ct. 3294, 3302, 73 L.Ed.2d 1042 (1982)], . . . (STEVENS, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," *id.*, at 666, n. 1 [102 S.Ct., at 3302, n. 1] . . . , the regulatory scheme may be attacked under section 1. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 [71 S.Ct. 745, 95 L.Ed. 1035 (1951); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980) . . .

Id. at 1050.

As explained in Justice Stevens' concurring opinion in *Norman Williams*, there are three types of restraints on competition—purely private, purely public, and hybrid. The purely private restraint is clearly not involved in this case because of the state's regulations. The issue therefore narrows itself to whether the Oregon regulations are a hybrid restraint or a purely public restraint. The resolution of this issue determines whether the regulations violate the Sherman Act.

An examination of *Schwegmann* and *Midcal* adds light to this issue. In *Schwegmann*, the liquor retailer petitioner had refused to agree to a retail price maintenance provision with

two liquor distributors. The distributors sought to enjoin the retailer from selling their products at less than the minimum prices fixed in their contracts with other retailers. At that time, a Louisiana statute permitted product distributors to enforce retail price maintenance provisions against contracting retailers and non-contracting retailers. Thus, if a distributor and single retailer entered into a contract fixing retail prices, all retailers were prohibited from selling below the price set by the contracting distributor and retailer. After finding that the statute went beyond the now-repealed Miller-Tydings Act, the Court held that the two liquor distributors had violated Section 1 of the Sherman Act when they attempted to hold the retailer to the prices fixed in other contracts.

In its discussion of *Schwegmann*, the Court in *Berkeley* stated:

> [U]nder the Louisiana statute, both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors. While the petitioner-retailer in that case may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices make it impossible to characterize the regulation as unilateral action by the State of Louisiana.

Berkeley, 106 S.Ct. at 1050.

In *Midcal*, California required all wine producers, wholesalers, and rectifiers to file fair trade contracts or price schedules with the state. If a wine producer did not set prices, wholesalers were required to post a price schedule for that product's brands. A wine merchant could sell wine only at those prices to a retailer. The Court held that this pricing system constituted resale price maintenance in violation of the Sherman Act. As in *Schwegmann*, the mere existence of legal compulsion did not transform a pricing scheme into uni-

lateral action by the state. The state had no direct control over the prices set by the private parties, and it did not review the reasonableness of those prices.

A comparison of *Schwegmann* and *Midcal* with this case leads to the conclusion that the Oregon regulations constitute a "hybrid" restraint in violation of the Sherman Act.[4] The argument that the regulations merely involve unilateral action must be rejected on two grounds. First, *Schwegmann* demonstrates that a showing of concerted activity among the Oregon wholesalers is not necessary to establish an antitrust violation. The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge. In *Schwegmann*, non-contracting retailers were compelled to comply unilaterally with a state-authorized pricing scheme, but the absence of concerted activity among the retailers was not a bar to a finding of a Sherman Act violation. Second, *Schwegmann*, and *Midcal* show that Oregon's actions are not unilateral. The regulations constitute a "hybrid" restraint because, as in those two cases, Oregon allows private parties to set the prices and does not review the reasonableness of those prices. It follows that this case is unlike the purely public restraint of Berkeley's regulatory scheme which removed the power to set rents from the landlords.

PARKER V. BROWN ISSUE

Having concluded that the Oregon regulations violate Section 1 of the Sherman Act, a decision must be made as to whether Oregon's involvement in the regulatory scheme is sufficient to establish antitrust immunity under *Parker v.*

---

[4] However, we affirm the district court's holding in favor of the wholesalers. Although the wholesalers are participants in a regulatory scheme effecting an antitrust violation, there is no evidence of concerted action on their part, "[T]here can be no liability under [sec.] 1 in the absence of an agreement." *Berkeley*, 106 S.Ct. at 1049.

Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker*, the Supreme Court held that the federal antitrust laws do not prohibit a state from imposing anticompetitive restraints on the marketplace. "The circumstances in which *Parker* immunity is available . . . to state agencies or officials regulating the conduct of private parties [is] defined most specifically by [the] decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra*, 445 U.S., at 97 [100 S.Ct., at 937] . . ." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 1727, 85 L.Ed.2d 36 (1985).[5] Under the test set forth in *Midcal*, the state agency must meet two standards in order to establish antitrust immunity. First, the challenged restraint must be " 'clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S., at 105, 100 S.Ct., at 943 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978)); *see also Llewellyn v. Crothers*, 765 F.2d 769, 773 (9th Cir. 1985) (applying two-part *Midcal* test to de facto fee schedule established by Oregon agency).

In *Miller II* this court applied the *Midcal* test and held that the Oregon regulations do not fall within the *Parker* exemption because the state does not actively supervise the restraint. Regardless of whether or not we are bound by this prior ruling under the "law of the case" doctrine, there is no reason to depart from that holding. As stated in *Miller II*:

> Oregon "neither establishes prices nor reviews the reasonableness of the price schedules . . . [nor does it]

---

[5] *Southern Motor Carriers* rebuts the state's assertion that under *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), it need not show "clear articulation" or "active supervision". In *Hoover*, the Court stated: "Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.' " *Id.* at 569, 104 S.Ct. at 1995.

> monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal*, *supra*, 445 U.S. at 105-06 [100 S.Ct. at 943-44], ... Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the commission "may reject any price posting which is in violation of any of its rules," Rule 210(1)(b), the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. . . . Oregon merely authorizes and enforces the disputed pricing practices. *See Midcal*, supra, 445 U.S. at 105 [100 S.Ct. at 943], ...

Miller II, 688 F.2d at 1226-1227.

There have been no material changes in Oregon's regulations scheme since *Miller II*, and we likewise conclude that Oregon has failed to satisfy the second part of the two part *Midcal* test.[6] Because the failure to show active supervision, by itself, removes the *Parker* exemption, there is no need to decide whether the state meets the first part of the test.

TWENTY-FIRST AMENDMENT ISSUE

Since the Parker exemption does not apply, it is necessary to turn to the final and dispositive issue of whether the Twenty-first Amendment shields the challenged regulations. The Supreme Court has stated the issue as " 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.' " *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-76,

---

[6] Oregon states that each agency is required by law to review the impact of its rules and that Oregon's "sunset review law" reviews the necessity of the existence of an agency. It argues that these measures constitute active supervision. This argument is without merit because neither means of review sets the actual prices or determines the reasonableness of those prices.

104 S.Ct. 3049, 3057-58, 82 L.Ed.2d 200 (1984) (*quoting Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S.Ct. 2694, 2708, 81 L.Ed.2d 580 (1984)).

In order to resolve this issue, it is necessary to consider and compare the conflicting federal and state interests. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, ___ U.S. ___, 106 S.Ct. 2080, 2087, 90 L.Ed.2d 552 (1986); *see Stein Distribution Co. v. Department of the Treasury Bureau of Alcohol, Tobacco & Firearms*, 779 F.2d 1407, 1410 (9th Cir. 1986). As the court said in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 946, 63 L.Ed.2d 233 (1980), "there is no bright line between federal and state powers over liquor. . . . The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' "

The federal interest embodied in the Sherman Act is well-recognized and substantial. The Sherman Act has been described as "the Magna Carta of free enterprise," *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972), and Congress " 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act," *Midcal*, 445 U.S. at 111, 100 S.Ct. at 946 (citations omitted). As we have noted, the Oregon regulations involved in this case compel activity that would constitute a per se violation of the Sherman Act.

Against this substantial impairment of the strong federal interest in favor of competition must be weighed the state's interest the challenged regulations serve.[7] The parties dis-

---

[7] Defendants argue the Oregon Court of Appeals' decision in *Miller v. Oregon Liquor Control Commission*, 42 Or.App. 555, 600 P.2d 954 (1979), determines the extent to which the challenged regulations serve interests under the Twenty-first Amendment. The state court's decision, however, determined only that the regulations were reasonably related to state stat-

(Footnote continued on next page)

agree as to the extent to which these regulations advance the interests Oregon avows and the closeness of these avowed interests to those the Twenty-first Amendment protects.

The district court did not reach this issue because it decided the case upon another ground. Since we have rejected the ground upon which the lower court's decision rested and since the Twenty-first Amendment issue may ultimately rest upon findings and conclusions having a large factual component, we remand this issue for the trial court's initial determination.

REVERSED AND REMANDED.

(Footnote continued from previous page)

utory purposes, and therefore that there was a valid exercise of the administrative agency's authority. The issues under the Twenty-first Amendment are quite different. The court must examine both the federal interest and the state interest and resolve the conflict between them in accordance with what is at stake for each in reality in the concrete case—the court must examine the purpose of the federal rule and the extent to which the state rule frustrates that purpose; the avowed purposes of the state rule and their closeness to the interest the Twenty-first Amendment serve; and the extent to which, in reality, the state rule serves its avowed purposes. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 108-14, 100 S.Ct. 937, 944-48, 63 L.Ed.2d 233 (1980).

APPENDIX B

Elsie Viola MILLER and
Oretta Bernice Lancaster,
doing business as the Junction Cafe and Tavern;
Taylor's Coffee Shop, Inc.,
dba Rennie's Landing;
Wian, Inc., dba Barney's Cable;
individually and as representatives
of others similarly situated;
Plaintiffs;

v.

William H. HEDLUND,
Sylvia S. Bedingfield,
Reuben A. Worster,
Stan Auderkirk, and Jill Thorne,
individually in their representative
capacities as the Commissioners of the
Oregon Liquor Control Commission;
C. Dean Smith,
individually in his capacity as Administrator for the
Oregon Liquor Control Commission;
Oregon Beer and Wine Distributors Association, Inc.;
Spear Beverage Co., Inc.;
Coast Distributors, Inc.; and
United Beer Distributing Company;
individually and as representatives of
others similarly situated;
Defendants.

Civ. No. 78-259-FR.

United States District Court,
D. Oregon.

Jan. 24, 1984.

[Names of counsel omitted in printing]

OPINION AND ORDER

FRYE, District Judge:

The matters before the court are plaintiffs' motion for summary judgment, state defendants' motion for summary judgment, and private defendants' motion for summary judgment.

This case involves an antitrust challenge to certain regulations promulgated by the Oregon Liquor Control Commission (OLCC). The regulations place limitations on the manner in which liquor wholesalers may sell wine and beer to retail customers. Plaintiffs are establishments that purchase beer and wine from wholesalers and sell beer and wine at retail. One group of defendants is composed of the Commissioners of the OLCC (the state defendants), another of beer and wine wholesalers (the private defendants). Plaintiffs allege that the regulations have the effect of stabilizing and maintaining the prices of beer and wine in the State of Oregon. Plaintiffs have moved for summary judgment, seeking declaratory and injunctive relief restraining the state defendants from enforcing the regulations at issue. The state and private defendants also have filed motions for summary judgment.

The challenged regulations require beer and wine wholesalers to do several things. Under OAR 845-10-210(1)(a), wholesalers must file with the OLCC a written schedule of prices at which they will sell beer at wholesale within the state. These prices must be uniform with classes of trade buyers. The prices must be for delivered product; that is, the wholesale price to a given customer is constant without regard to transportation considerations. Quantity discounts are prohibited. Under paragraph (c) of this regulation, prices so posted become effective ten days after receipt by the OLCC, unless rejected by the OLCC under paragraph (b). Prices may

not be changed except in accordance with OLCC rules. Under paragraph (d), if a price filing reflects a decrease in price, the posting, and hence the price, must remain in effect for 90 days, unless the OLCC, in its discretion, waives the 90-day period for certain reasons set out in the regulation. OAR 845-10-210(2) sets up similar restrictions for the wholesale distribution of wine, except that the "post-off" period—i.e., the period of time for which a decrease in price must remain posted—is 30 days rather than 90 days.

In their motion for summary judgment plaintiffs seek an injunction restraining enforcement of these regulations on the ground that they are void by reason of their conflict with and preemption by the Sherman Act, 15 U.S.C. § 1, pursuant to the Supremacy Clause of the United States Constitution. The state defendants seek summary judgment on the grounds that (1) the regulations are valid regulations of interstate commerce under the 21st amendment to the United States Constitution; (2) the regulations constitute "state action" which is immune from the Sherman Act under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct 307, 87 L.Ed. 315 (1943), and (3) the state defendants have not engaged in a combination, conspiracy, or agreement in restraint of trade, and the regulations do not require or authorize such a combination on the part of private parties. The private defendants seek summary judgment based on the absence of any showing by the private defendants to restrain trade.

The parties are in agreement that the issues present questions of law appropriate for resolution on a motion for summary judgment.

ARE THE REGULATIONS PREEMPTED BY THE SHERMAN ACT?

In order to prevail, plaintiffs must show that the regulations are preempted by the Sherman Act. In *Rice v. Norman*

Williams Co., 458 U.S. 654, 102 S.Ct 3294, 73 L.Ed.2d 1042 (1982), the Supreme Court indicated that state regulatory schemes are only preempted by the Sherman Act in those cases where compliance with the scheme necessarily leads to an antitrust violation:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.
>
> A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. In *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), we examined a statute that *required* members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act.
>
> By contrast, in *Seagram & Sons v. Hostetter*, [384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966)], we rejected a facial attack upon § 9 of New York's Alcoholic Beverage Control Law, which required retailers

> and wholesalers to file monthly price schedules with the State Liquor Authority accompanied by an affirmation that the prices charged were no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. *Id.*, 384 U.S. at 39-40, 86 S.Ct. at 1257-1258. The Court found no clear repugnancy between § 9 and the federal antitrust laws. . . .
>
> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract.

Id. at 3299-3300 (citations, footnotes omitted).

The plaintiffs argue that the challenged regulations require behavior that is a *per se* violation of the Sherman Act. *See The Sugar Institute, Inc. v. United States*, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936) (price posting plus agreement to adhere to posted prices); *see Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948) (quoting only delivered prices); *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (post-off provisions). The state defendants argue that section 1 of the Sherman Act only reaches contracts, combinations, or conspiracies that restrain trade; and hence, that the regulations do not necessarily lead to an antitrust violation unless they require some inter-wholesaler agreement. Because the regulations only require unilateral wholesaler conduct and because the regulations neither com-

pel nor authorize inter-wholesaler agreements to restrain trade, the regulations are not subject to preemption.

Defendants rely primarily upon *Enrico's, Inc. v. Rice*, 551 F.Supp. 511 (N.D. Cal. 1982), *Serlin Wine and Spirit Merchants, Inc. v. Healy*, 512 F.Supp. 936 (D. Conn. 1981), *aff'd sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353 (2nd Cir. 1981), and *United States Brewers Association v. Healy*, 532 F.Supp 1312 (D. Conn. 1982), *rev'd on other grounds* 692 F.2d 275 (2nd Cir. 1982). *Enrico's* involves 4 Cal. Admin. Code § 100, which *inter alia* requires wholesalers of distilled spirits to post prices and to adhere to the posted prices for at least a month, and which allows quantity discounts only according to a regulatory formula. The court in *Enrico's* held that these regulations were not preempted by the Sherman Act because of the lack of any requirement or authorization in the regulations of inter-wholesaler agreements. The court specifically rejected the argument made in the present case by plaintiffs that the regulations themselves constitute the required agreement or combination. 551 F.Supp. at 513. The *Enrico's* court also specifically rejected the reasoning of *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*, 136 Cal.App.3d 829, 186 Cal.Rptr. 552 (1982), *cert. denied* ___ U.S. ___, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983), relied upon by plaintiffs and discussed below. *Serlin v. Healy*, *supra*, deals with similar Connecticut regulations requiring manufacturers and out-of-state shippers to post prices for the next month, and further requiring wholesalers and retailers to sell for no less than a "cost" figure determined by the regulations according to a formula from this initial price posting. Both the district court and the Second Circuit found the regulations immune from antitrust preemption because the statutory scheme "[does] not authorize or compel private parties to enter contracts or combinations to fix prices in violation of § 1 of the Sherman Act." *Morgan*

supra, 664 F.2d at 355.[1] Finally, *United States Brewers Association v. Healy*, *supra*, deals with a number of Connecticut regulations, including price posting requirements, discount prohibitions, prohibitions on discriminating between customers, minimum mark-up requirements, and mandated exclusive territories. Again, finding that the regulations did not compel or authorize any agreement between private parties, the court held that they were not preempted by the Sherman Act.

Plaintiffs place primary reliance on *Lewis-Westco*, *supra*. There, the California Court of Appeals struck down certain California regulations as preempted by the Sherman Act. The regulations required manufacturers, rectifiers, and wholesalers to post prices and to sell only at the posted prices. The appeals court felt that its ruling was compelled by the California Supreme Court's earlier decision in *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), and its own earlier decision in *Midcal Aluminum v. Rice*, 90 Cal.App.3d 979, 153 Cal.Rptr. 757 (1979), *aff'd sub nom. California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). However, the *Rice* and *Midcal* cases deal with regulations that require all sellers at a given distribution level to sell at least at a minimum price (*Rice*) or at a price set by producers themselves (*Midcal*). Because this scheme effectively forced all sellers on a given distribution level to sell at one set price, the *Rice* and *Midcal* courts had little difficulty finding that the regulations mandated price fixing, which clearly constitutes a *per se* violation of the Sherman Act. The California courts had no need to address the "unilateral action" argument made by the state defendants here because the regulations at issue in the California cases mandated mul-

[1] These courts also held that the State of Connecticut was entitled to *Parker* immunity for the regulations.

tilateral compliance with a price-setting scheme. In *Lewis-Westco*, the court did not directly address the unilateral action argument, although it clearly recognized the important unilateral v. multilateral distinction in the regulations before it as opposed to the regulations at issue in *Rice* and *Midcal*. The *Lewis-Westco* court reasoned that because the price posting regulations had the *effect* of stabilizing prices, the regulations were subject to preemption. However, this analysis seems to ignore the teachings of *Rice v. Norman Williams*, *supra*, that a statutory scheme "is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive *effect*." 102 S.Ct. at 3299 (emphasis added). It is only a *per se* violation of the Sherman Act if a *combination* exists for the purpose and with the effect of stabilizing prices. Because the price posting statute requires only unilateral wholesaler action, the necessary element of agreement is lacking, and hence the Oregon price posting scheme does not authorize or mandate conduct that necessarily constitutes a violation of the antitrust laws. As such, the regulations are not subject to preemption.[2]

---

[2] At first glance, another case upon which plaintiffs rely, *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982), appears more troublesome to defendants' position. There, the Ninth Circuit upheld a district court's injunction against certain Nevada regulations over dairy product pricing. Under the Nevada scheme, a dairy producer must file lists of wholesale, retail, and distributor prices, which do not become effective until seven days after filing. The filed prices are made public, and sales cannot be made below the filed price, or below cost. The standard of review used in the case was whether the district court abused its discretion in enjoining enforcement of the regulations; the Ninth Circuit did not consider the legal issues involved *de novo*. However, the court seemed to indicate that if the effect of the regulations was to lessen price competition, then they could be enjoined. The impact of this ruling is uncertain. On the one hand, the court did not say that the effect of the regulations was a *per se* violation of the Sherman Act; rather, a hearing on the merits was required to determine whether in fact the regulations had an anticompetitive effect. (This appears to indicate that, even were *Knudsen* considered controlling, plaintiffs would not be entitled to summary judgment at this time.) On the other hand, the court cited no cases in support of the proposition that effect is

(Footnote continued on next page)

This result is a common sense result. The purpose of the Sherman Act is to restrain businesses from agreeing, conspiring, or combining for the purpose of thwarting free market mechanisms. While the regulations at issue in this case do restrict the ability of wholesalers to price their products with absolute freedom, there is no reason why the wholesale price of beer and wine in Oregon should not gravitate down to its more competitive level, absent some sort of *private* agreement to use the regulations for anticompetitive purposes. It may be that beer and wine wholesalers in Oregon do in fact reach express or tacit agreements that involve use of the regulations for the purposes of stabilizing prices. If so, their actions would be in violation of the Sherman Act; but the illegality is a result of their *agreement* to combine for the purpose of restraining trade, and is not mandated or authorized by the regulations themselves.

Thus far the court's opinion relates to the price posting and post-off provisions of the regulations. These provisions are not preempted because as to the essential activity to which they relate—pricing—the provisions do not require inter-wholesaler agreement or concerted action. Each wholesaler is free to set his own prices, without regard to the prices set by other wholesalers. A different situation is presented by the other two provisions, the prohibition against quantity discounts and the delivered price rule.

There are limits to the unilateral action argument advanced by the state defendants. Taken to its extreme, the argument would uphold any state regulatory scheme that

---

(Footnote continued from previous page)

sufficient, and could not have relied on *Rice v. Norman Williams, supra*, because *Rice* was decided after the *Knudsen* decision was handed down. This fact, plus the fact that the *Knudsen* court was reviewing on an "abuse of discretion" standard, and the differences between the regulations at issue there and in the present case, limits the authority of *Knudsen* for purposes of analysis in the present case.

mandated any private action, because the regulated actors could argue that because there exists no inter-actor agreement or combination, no *per se* violation occurs, and therefore the scheme cannot be preempted. The limit to the argument comes at a point between the price posting/post-off rules on the one hand, and the delivered price/quantity discount rules on the other. Although the former rules do not require wholesalers to act in concert with respect to the prices they set, the latter rules do require all wholesalers to adhere to identical horizontal restraints. By requiring all wholesalers to adhere to the delivered price/quantity discount rules, the State of Oregon forces all wholesalers to agree to abide by these restraints as a condition for continuing to do business, much as was the case in *Midcal*. Thus the element of agreement missing with respect to the price posting/post-off rules is present here. Hence, the delivered price/quantity discount rules may mandate conduct that is a *per se* violation of the Sherman Act. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980).[3]

Because the delivered price/quantity discount rules may mandate conduct constituting a *per se* Sherman Act violation, the court must address the state defendants' contentions that these rules are shielded from the Sherman Act by the *Parker*

---

[3] This distinction is much less tenuous than appears at first glance. The price posting/post-off rules only require unilateral action from a wholesaler, the setting by the wholesaler of his own price, and adherence to that price. Since all wholesalers must adhere to the prices they individually set, there is an element of agreement mandated by the regulations. Standing alone, however, it is not an antitrust violation for a number of wholesalers to adhere to their own publically [*sic*] -known prices. It is only a violation if the wholesalers adhere to their own publically [*sic*] -known prices and do so with knowledge of the prices of the other wholesalers and with the agreement of other wholesalers that they will adhere to their prices. These elements, however, are neither mandated nor authorized by the price-posting/post-off rules.

state action doctrine and section 2 of the Twenty-First Amendment.

The state action issue has arisen previously in this case. Earlier this court dismissed plaintiffs' claims, holding that the regulations at issue were entitled to immunity from the federal antitrust laws under *Parker* and its progeny. This ruling was reversed by the Ninth Circuit in *Miller v. OLCC*, 688 F.2d 1222 (9th Cir. 1982). The parties dispute the effect of this ruling on the case in its present posture. Plaintiffs contend that this court is foreclosed from reconsidering the state defendants' state action arguments; defendants contend that the holding in *Miller* was narrower than plaintiffs believe, and that certain statutory changes since the decision in *Miller* make it more likely that the state can now meet the *Midcal* "active supervision" test.

Although the court is hesitant to examine the state action issue again after the Ninth Circuit's decision, the court is uncertain as to whether the opinion covers the case in its present posture. First, *Miller* dealt with all four of the challenged regulations, but the case as it presently stands presents the state action issue only with respect to the quantity discount/delivered price rules. Second, the *Miller* opinion stressed the fact that if the price posting provisions did in fact mandate or authorize conduct violative of the Sherman Act (an issue upon which the court expressly reserved judgment), then *Parker* immunity would be unavailable because the OLCC did not review the reasonableness of the posted prices, as required by *Midcal*. Indeed, a fair reading of the *Miller* opinion indicates that it is concerned with the price posting provisions rather than with the delivered price/quantity discount rules. Third, there is language in the *Miller* opinion itself that might support the view that, as to these remaining rules, state action immunity is available. Finally, certain statutory and administrative changes have occurred in Oregon

since the *Miller* opinion which might impact on the question of whether Oregon adequately supervises the regulatory scheme at issue. For all of these reasons, the court will examine whether the quantity discount/delivered price rules are entitled to *Parker* immunity.

Midcal, supra, sets out a two-part test for determining whether *Parker* immunity should apply to a state scheme:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised by the state itself."

445 U.S. at 105, 100 S.Ct. at 943, *quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 at 410, 98 S.Ct. 1123 at 1135, 55 L.Ed.2d 364 (opinion of Brennan, J.). In *Miller*, the Ninth Circuit held that the "active supervision" prong of the test was not met in the present case because

> . . . Oregon "neither establishes prices nor reviews the reasonableness of the price schedules . . . [nor does it] monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal, supra*, 445 U.S. at 105-06, 100 S.Ct. at 943. Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the commission "may reject any price posting which is in violation of any of its rules," Rule 210(1)(b), the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. . . . Oregon merely authorizes and enforces the disputed pricing practices. *See Midcal, supra*, 445 U.S. at 105, 100 S.Ct. at 943. It does not " 'displace unfettered business freedom' with its own power." *Id.* at 106 n. 9, 100 S.Ct. at 943 n. 9, *quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., supra*, 439 U.S. 96, at 109, 99 S.Ct. 406 at 411-412, 58 L.Ed.2d 361.

Miller, supra, 688 F.2d at 1226-27. Presently at issue, however, are two rules with no explicit pricing function; that is, these rules do not enforce wholesaler-set prices, but rather mandate restraints that make irrelevant factors that would ordinarily influence prices in an unregulated market. It is much less clear how to apply the "active supervision" test to rules such as these.

This court recently examined the *Parker* doctrine in a different factual context. *Llewellyn v. Crothers*, Civ. No. 81-6462FR (D. Ore. April 20, 1983). There, the court determined that the legal issues inherent in the *Parker* doctrine should be resolved in light of the theoretical basis for the doctrine: the notion of federalism. The *Parker* doctrine exists because

> [W]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directly by its legislature.
>
> . . . .
>
> True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. [Citation omitted] . . . . Here the state command . . . is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken as a prohibition of individual and not state action. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it . . ., in the execution of governmental policy.

Parker, supra, 317 U.S. at 351-52, 63 S.Ct. at 313-14.

Against the federalism background of the *Parker* decision, the court finds that the delivered price/quantity discount rules fall within the scope of the *Parker* doctrine and are entitled to state action immunity. First, the rules are clearly articulated and affirmatively expressed as state policy. In *Llewellyn, supra*, this court held that

> an action with an anticompetitive effect taken by a state agency will be accorded *Parker* immunity if it can be said that the anticompetitive effect is a necessary or foreseeable result of the agency's execution of a statutory directive or policy. "The antitrust court should require only that the result of an agency's act or decision be of the sort contemplated by state anticompetitive policy." [P. Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv. L. Rev. 435 at 453 (1981)].

Id. at 14. Here, the rules at issue were promulgated to enforce the statutory prohibitions against financial assistance by wholesalers of liquor to retailers of liquor. ORS 471.415, 471.465. Although the relation between the prohibition against financial assistance and the regulations at issue is said by plaintiffs to be tenuous, the Oregon courts have held that the rules reasonably advance the purposes of the statutes. *Miller v. OLCC*, 42 Or. App. 555, 600 P.2d 954 (1979). More importantly, it is foreseeable that the financial assistance statute may have an anticompetitive effect. Hence, the rules meet the first prong of the *Midcal* test.

As to the second prong—active supervision—the court finds that the rules also meet the test. The importance of the active supervision test has been described in the following way:

> The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

Miller, supra, 688 F.2d at 1225, *quoting* 1 P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 213 at 73 (1978) (footnotes omitted). Here, active state supervision exists because the rules at issue were promulgated by the state agency itself, and imposed on wholesalers and retailers. This is not a case where the state merely authorizes private anticompetitive action or declares private anticompetitive actions to be lawful. The regulations at issue do not authorize private parties to agree upon and effectuate non-price horizontal restraints; rather, the restraints are imposed upon the private parties by the state. Finally, since the decision in *Miller*, Oregon has enacted comprehensive legislation requiring periodic review by all state agencies of the economic effect of their regulations. ORS 183.545, 183.550. The OLCC is currently scheduled to review the regulations at issue in the summer of 1984. This is the sort of monitoring of market conditions and "pointed reexamination" of the program required to meet the active supervision test.

With respect to the plaintiffs' motion for injunctive and declaratory relief, the court holds that (1) the price posting and post-off rules are not subject to preemption by the Sherman Act because they do not mandate or authorize conduct constituting a *per se* antitrust violation, and (2) insofar as the delivered price/quantity discount rules may mandate or authorize such a *per se* violation, they are nevertheless entitled to immunity under the *Parker* doctrine. The plaintiffs' motion for summary judgment is therefore denied, and the state defendants' cross motion for summary judgment is granted.

The remaining issue is the private defendants' motion for summary judgment on the grounds "that there are no genuine issues of matrial [sic] facts concerning the absence of any concerted activity by these moving defendants." Private

Defendants' Cross-Motion for Summary Judgment at 2. As stated earlier, it is possible that, although the regulations at issue do not mandate or authorize any inter-wholesaler combinations, wholesalers nevertheless do *in fact* use the regulations for anticompetitive purposes. In their motion, the private defendants contend that plaintiffs have submitted no evidence of any inter-wholesaler combination except (1) a summary of wholesale prices for Miller and Budweiser beer and (2) an affidavit of Albert Usher stating that in his opinion the price posting rules cause price uniformity.

Because the parties (and particularly the plaintiffs) have expended great effort on the preemption issue and very little effort on this issue, the court declines to rule on the private defendants' motion for summary judgment. Instead, it is ordered that plaintiffs' file within 20 days of the date of this order a memorandum of law and supporting materials specifically addressing the private defendants' motion. The private defendants shall within 15 days thereafter respond, at which time the court will decide the issue. If the plaintiffs file nothing within 20 days, the court will grant the private defendants' motions.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiffs' motion for summary judgment is DENIED.

2. State defendants' motion for summary judgment is GRANTED.

3. Within 20 days of the date of this order plaintiffs shall file a memorandum of law with such supporting materials as they deem necessary and defendants shall respond within 15 days thereafter. The court will thereafter rule on private defendants' motion for summary judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELSIE VIOLA MILLER, et al.,	)	
	)	
Plaintiffs-Appellants,	)	No. 84-3749
	)	
v.	)	
	)	
WILLIAM H. HEDLUND, et al.,	)	ORDER
	)	
Defendants-Appellees.	)	
	)	

Before: BROWNING, Chief Judge, ALARCON, Circuit Judge, and STEPHENS,* District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* Honorable Albert Lee Stephens, Jr., Chief Judge Emeritus, Central District of California, sitting by designation.